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IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

THE CHASE MANHATTAN BANK, AS INDENTURE TRUSTEE, UNDER THE INDENTURE, DATED AS OF MAY 6, 1998,
Petitioner,
v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether corporations organized under the laws of the British Virgin Islands and other United Kingdom Overseas Territories qualify as "citizens or subjects of a foreign state" under the federal alienage diversity jurisdiction statute, 28 U.S.C. § 1332(a)(2).

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BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Government of the United Kingdom of Great Britain and Northern Ireland submits this *amicus curiae* brief in support of petitioner, The Chase Manhattan Bank (now known as JPMorgan Chase Bank).[1]

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the United Kingdom or its counsel has made a monetary contribution to the brief's preparation and submission.

INTEREST OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

The United Kingdom has a substantial interest in the question before the Court – whether corporations formed under the laws of the United Kingdom Overseas Territories are "citizens or subjects" of the United Kingdom for purposes of the alienage diversity jurisdiction statute. The issue directly implicates how the United Kingdom, under its own laws, views the nationality of such corporations.[2] The decision below has perpetuated a misinterpretation of United Kingdom law by the same court in *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998). If permitted to stand, the decision will result in hundreds of thousands of Overseas Territories corporations – all of which the United Kingdom considers its subjects – being denied access to the jurisdiction of United States federal courts. Placing those corporations beyond the reach of federal jurisdiction jeopardizes the

[2] The "United Kingdom," in the community of sovereign states, includes the metropolitan territory of Great Britain and Northern Ireland (consisting of England, Wales, Scotland, and Northern Ireland), the Overseas Territories, and the Crown Dependencies. The Overseas Territories consist of Anguilla, Bermuda, the British Antarctic Territory, the British Indian Ocean Territory, the British Virgin Islands, the Cayman Islands, the Sovereign Base Areas in Cyprus, the Falkland Islands, Gibraltar, Montserrat, Pitcairn, St. Helena and dependencies, South Georgia and the South Sandwich Islands, and the Turks and Caicos Islands. The Crown Dependencies consist of the Channel Islands (the Bailiwicks of Jersey and Guernsey) and the Isle of Man.

stability of commercial dealings between those corporations and their American trading partners, and threatens the viability of future investment and commerce. This, in turn, could cause broader damage to the commercial relations between the United States and the United Kingdom in various places throughout the world.

Her Majesty's Government expressed its concern about this issue in a recent Diplomatic Note requesting assistance from the United States Department of State in obtaining a reversal of the decision below. That Diplomatic Note sets forth the United Kingdom's position in unmistakable terms:

> The United Kingdom wishes to restate its position that corporations incorporated under the laws of any of its Overseas Territories are subjects of the United Kingdom. The United Kingdom is therefore of the view that such corporations ought to be amenable to the alienage jurisdiction of United States Federal Courts under 28 U.S.C. § 1332(a)(2), whether as plaintiffs or defendants. Court decisions which fail to recognise such jurisdiction may have a serious detrimental effect on the trading relationship between the United States and the United Kingdom Overseas Territories.

Diplomatic Note No. 90/2001 (Oct. 5, 2001) (printed in the appendix to the brief submitted by the United Kingdom in support of the petition for a writ of *certiorari* in this case).

The United Kingdom Government also has submitted its views to several courts in the United States in which the issue of the nationality of Overseas Territories corporations has arisen. For example, in February 2000 the United Kingdom filed an *amicus curiae* brief in the Second Circuit in support of the appellee in *III Finance*

Ltd. v. Aegis Consumer Finance, Inc. No. 00-7016 (2d Cir. 2000). In that brief, the United Kingdom attached an earlier Diplomatic Note to the United States setting forth its official position that "corporations incorporated under the laws of any of its Overseas Territories are subjects of the United Kingdom." L-29 (Diplomatic Note No. 13/2000 (Feb. 2, 2000)).[3] That same year, the United Kingdom filed another *amicus curiae* brief on this issue in the Fifth Circuit in *ART 57 Properties, Inc. v. 57 BB Property, L.L.C.*, No. 99-10385 (5th Cir. 2000). L-1. The appellate courts in *III Finance* and *ART 57 Properties* did not reach the merits of the alienage jurisdiction issue.

In addition, the United Kingdom filed an *amicus curiae* brief in support of the petition for a writ of *certiorari* filed in *Matimak Trading Co. v. Khalily*, No. 97-893 (Dec. 29, 1997). The Attorney General of the British Virgin Islands issued a statement dated February 3, 2000, expressing his support of the position taken by the United Kingdom before the United States courts. L-35.

SUMMARY OF ARGUMENT

In holding that a British Virgin Islands corporation is not a "citizen or subject of a foreign state" under the alienage diversity jurisdiction statute, the court below relied entirely on its earlier erroneous ruling in *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998), and other Second Circuit cases following that decision. Every other court of appeals to consider the question has reached the opposite

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[3] "L-__" refers to the Lodging that the parties are submitting to the court together with their Joint Appendix.

conclusion, *i.e.*, that corporations incorporated in the United Kingdom Overseas Territories *are* citizens or subjects of the United Kingdom, and even within the Second Circuit itself there is substantial dissent regarding the propriety of the *Matimak* holding.

The controversy surrounding the *Matimak* decision stems from a fundamental defect in the appellate court's analysis. Although the court acknowledged that the United Kingdom rightfully could determine for itself which individuals and entities are its citizens or subjects, the court's examination of United Kingdom law as it bears on the status of Overseas Territories corporations was cursory and flawed. The court did not examine the constitutional relationship between the United Kingdom and its Overseas Territories, and it failed to recognize that governments of the Overseas Territories are products of legislation enacted in the United Kingdom, which retains sovereign authority over their continuing operations. To the extent that the *Matimak* court examined the law of the United Kingdom at all, it focused on two inapposite statutes – one governing only companies incorporated in Great Britain, and the other delineating the different categories of citizenship of natural persons. Neither of these statutes has any bearing on the nationality of companies incorporated in the Overseas Territories.

Other sources of U.K. law and practice, which the *Matimak* court did not consider, demonstrate that Overseas Territories corporations are indeed citizens or subjects of the United Kingdom, and should thus be able, under 28 U.S.C. § 1332(a)(2), to sue and be sued in the federal courts of the United States. Under the constitution of the British Virgin Islands – which was created pursuant to authority granted to Her Majesty by an Act of Parliament – the United Kingdom retains responsibility for and sovereignty over the affairs of the BVI

government and people. Although the constitution delegates lawmaking power to the BVI legislature, all local legislation is subject to the approval of Her Majesty's Government, and may be "disallowed" by the Crown at any time. All BVI laws – including BVI corporation laws – are therefore the products of an Act of Parliament, and have received Her Majesty's assent. Moreover, the BVI constitution reserves to the Queen the power to legislate directly for the "peace, order and good government of the Virgin Islands." Thus, although it has delegated some governmental functions to the BVI government, the United Kingdom clearly has retained its sovereign power over the British Virgin Islands as well as its corporations and inhabitants.

The United Kingdom also is internationally responsible for its Overseas Territories. As a result, it may exercise its sovereignty to protect Overseas Territories corporations in their relations with foreign countries, and to control their activities abroad. Other nations, including the United States, have acknowledged that the sovereignty of the United Kingdom extends to the Overseas Territories by entering into agreements with the United Kingdom concerning those territories. These agreements demonstrate both that the United Kingdom views the inhabitants and corporations of the Overseas Territories as its citizens or subjects and that other nations defer to this view.

Finally, *Matimak* was wrong in concluding that natural persons from the Overseas Territories are not citizens or subjects of the United Kingdom simply because the British Nationality Act 1981, c. 61 ("the 1981 Act") categorizes them as "British Dependent Territories citizens" rather than "British citizens" or "British subjects." The 1981 Act does not purport to define "citizens or subjects of the United Kingdom," and does

not contain an exhaustive list of persons entitled to that status. Statutes that use the term "United Kingdom national," however, do include citizens of the Overseas Territories within the definition. The distinctions drawn in the 1981 Act – which will soon be amended to include most "Overseas Territories citizens" within the definition of "British citizens" – do not alter the fact that the United Kingdom considers the inhabitants of the Overseas Territories to be United Kingdom citizens.

ARGUMENT

The court below did not conduct an independent evaluation of the defendant Traffic Stream's nationality, but held that it was constrained by its earlier decision in *Matimak* to conclude that all BVI corporations – and, by implication, all Overseas Territories corporations – are "stateless." Pet. App. 5a, 7a. The court correctly observed that, like Hong Kong at the time of *Matimak*, the British Virgin Islands is a British Dependent Territory.[4] *Id.* Because "[n]othing relevant to the alienage jurisdiction inquiry has changed" since its decision in *Matimak*, the court considered itself "bound to hold that Traffic Stream is not a citizen or subject of a foreign state," and that the district court therefore lacked jurisdiction over the action. *Id.*

In *Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130 (2d Cir.), *amended*, 229 F.3d 424 (2d Cir.),

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[4] The court below acknowledged the United Kingdom Government's decision to refer to "Dependent Territories" as "Overseas Territories" and explained, correctly, that there is "no practical difference" between the two terms. Pet. App. 6a-7a n.1.

reh'g en banc denied, 229 F.3d 187 (2d Cir. 2000), the court similarly considered itself bound to follow *Matimak*, despite the expressed view of two of the three judges on that panel that *Matimak* – itself a divided decision – was wrongly decided. In that case, the Second Circuit held that Bermuda corporations and citizens are not citizens or subjects of the United Kingdom for purposes of the alienage diversity jurisdiction statute. *Id.* at 139. The court's amended opinion added a footnote explaining that Judges Cardamone and Newman felt "constrained by the precedential force of *Matimak*," and that, "[w]ere the question open in this Circuit, both would rule that citizens of Bermuda and other British Dependent Territories are sufficiently subject to the sovereignty of the United Kingdom to satisfy the alienage clause of the diversity statute . . . ." 229 F.3d at 424-25. Subsequently, three other judges on the Second Circuit dissented from the denial of a petition for rehearing *en banc*, indicating that they would overrule *Matimak*. 229 F.3d at 187-93 (Sotomayor, J., joined by Leval, J., dissenting from denial of rehearing *en banc*); *id.* at 194 (Calabresi, J., dissenting from denial of rehearing *en banc*).

Thus, despite the fact that the Third, Fourth, and Seventh Circuits have all reached the opposite conclusion,[5] and despite the fact that several Second Circuit judges have concluded that *Matimak* was wrongly decided, *Matimak* stands as a formidable bar to the exercise of jurisdiction over corporations from the

[5] *See Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 413, 418 (3d Cir. 1999); *Koehler v. Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1242-43 (7th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991).

Overseas Territories in a jurisdiction that includes New York – the commercial center in the United States for international transactions.[6] *Matimak* should be overruled because its holding rests on a distorted view of the applicable law of the United Kingdom. As a matter of U.K. law, Overseas Territories corporations are subjects of the United Kingdom. Especially in light of the commercial and governmental interests at stake, *Matimak's* error regarding the substantive content of U.K. law should not be permitted to preclude United States federal courts from exercising alienage diversity jurisdiction over corporations from the Overseas Territories.

I. CORPORATIONS OF THE BRITISH VIRGIN ISLANDS ARE CREATED UNDER THE SOVEREIGNTY OF THE UNITED KINGDOM AND ARE THUS "CITIZENS OR SUBJECTS" OF THE UNITED KINGDOM FOR PURPOSES OF ALIENAGE DIVERSITY JURISDICTION

In holding that an Overseas Territory corporation could not bring suit in federal court because it was a "stateless" entity, the *Matimak* court rejected the view of the United States Justice Department, as *amicus curiae*, that the British Crown's "ultimate sovereign authority

[6] In addition to the decision below, other cases from the Second Circuit following *Matimak's* holding that corporations from the Overseas Territories are not citizens or subjects of a foreign state include *Universal Reinsurance Co. v. St. Paul Fire and Marine Ins. Co.*, 224 F.3d 139, 140-41 (2d Cir. 2000), *Klein v. Marriott Int'l, Inc.*, 34 F. Supp. 2d 176, 178-80 (S.D.N.Y. 1999), and numerous unpublished cases from the Southern District of New York.

over the plaintiff" rendered the plaintiff a subject of the United Kingdom. The court reasoned that "[t]he fact that the Hong Kong Companies Ordinance may be 'ultimately traceable' to the British Crown is too attenuated a connection" to support a finding that companies incorporated under that Hong Kong statute were citizens or subjects of the United Kingdom. 118 F.3d at 86. The court's statement reflects a fundamental misunderstanding of the relationship between the United Kingdom and the laws, inhabitants, and corporations of its Overseas Territories. As explained below, the statutes on which the *Matimak* court relied – the Companies Act 1948, c. 38, and the British Nationality Act 1981 – do not support the court's ruling that corporations from the Overseas Territories are "stateless." Moreover, other sources of U.K. law and practice clearly demonstrate that corporations from the Overseas Territories are subject to the sovereignty of the United Kingdom.

A. The *Matimak* Court's Reliance on the Companies Act and the British Nationality Act Was Misplaced, As Neither of Those Statutes Purports to Determine Which Entities Are Citizens or Subjects of the United Kingdom.

The *Matimak* court did not dispute that the United Kingdom, like any other nation, "is entitled to define who are its citizens or subjects." 118 F.3d at 85. In fact, it characterized this principle as "a truism," *id.*, and other U.S. authorities validate that characterization. *See, e.g.*, *United States v. Wong Kim Ark*, 169 U.S. 649, 668 (1898) ("Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship."); *Sadat v.*

Mertes, 615 F.2d 1176, 1183 (7th Cir. 1980); 13B CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3604, at 393 (2d ed. 1984). Thus, although the meaning of the phrase "citizens or subjects of a foreign state" under 28 U.S.C. § 1332(a)(2) is a question of U.S. law, the question whether a BVI corporation is in fact a "citizen" or "subject" of the United Kingdom is one that must be answered with reference to the law of the United Kingdom. The views of the United Kingdom on such questions are entitled to deference in the courts of the United States. *See, e.g., In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) ("A court of the United States owes substantial deference to the construction France places on its domestic law.").

In *Matimak*, the court looked to the British Nationality Act 1981 and the Companies Act 1948 to determine whether Overseas Territories corporations are citizens or subjects of the United Kingdom under U.K. law. *See* 118 F.3d at 85-86. Both of these statutes are inapposite, however, because neither purports to define the nationality of corporations from the Overseas Territories. Nor can either Act be said to contain an exhaustive list of entities and individuals who are citizens or subjects of the United Kingdom.

The *Matimak* court concluded erroneously that only companies incorporated under the Companies Act 1948 could be citizens or subjects of the United Kingdom. Because Hong Kong – like the British Virgin Islands – was not itself a foreign state, and because the Hong Kong company in that case was incorporated under a Hong Kong statute, the court decided that the company was a "stateless" entity. 118 F.3d at 84-86. But that reasoning is flawed. The Companies Act 1948 deals only with "British" companies, *i.e.*, companies incorporated in Great Britain (England, Wales, and Scotland), as

contrasted with "United Kingdom" companies. Thus, the Companies Act 1948 has no bearing on the nationality of companies from other parts of the United Kingdom outside Great Britain. Other companies that are unquestionably citizens or subjects of the United Kingdom, such as Northern Ireland corporations, are also not incorporated under the Companies Act 1948 and are thus not "British companies." Because Great Britain is not a recognized sovereign state, but rather a component of the United Kingdom, "British companies" – merely by virtue of their status as such – have no greater claim to U.K. nationality than Overseas Territories companies. The fact that local legislative bodies in various territories under the sovereignty of the United Kingdom have enacted their own companies legislation does not mean that Overseas Territories companies are any less citizens or subjects of the United Kingdom.

Nor, contrary to the holding in *Matimak*, does the British Nationality Act 1981 render Overseas Territories corporations "stateless." The Nationality Act, like the internal nationality legislation of most countries, concerns only natural persons. It does not purport to, and indeed does not, address the nationality of corporations in the United Kingdom.[7] Notwithstanding their omission from

[7] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 426 (5th ed. 1998) ("A major point of distinction [between individual and corporate nationality] is the absence of legislative provisions in municipal law systems which create a national status for corporations: domestic nationality laws do not concern themselves with corporations."); 1 OPPENHEIM, INTERNATIONAL LAW § 380 at 861 n.7 (9th ed. 1992) ("It is not usual for a state's internal law expressly to provide that a corporation has that state's nationality . . . .").

the Nationality Act, however, it is generally accepted that all "[c]orporations incorporated under the law in force in any part of H[er] Majesty's dominions" are properly considered United Kingdom nationals, and thus are citizens or subjects of the United Kingdom for alienage jurisdiction purposes.[8] *See* L-31 (Rule 1(a)(2) and 1(b), Rules Applying to International Claims, 7 Diplomatic Service Procedure Manual, Annex 1 (Mar. 1996)) (defining "United Kingdom national" to include "British Dependent Territories Citizens" and "[c]ompanies incorporated under the law of the United Kingdom or of any territory for which the United Kingdom is internationally responsible").

B. BVI Corporations Are Subject to the Sovereignty of the United Kingdom By Virtue of the Constitutional Relationship Between the British Virgin Islands and the United Kingdom.

According to *Matimak*, in U.S. law "a corporation is a 'citizen' or 'subject' of the entity under whose sovereignty it is created." *Matimak*, 118 F.3d at 79, 85 (citing *National Steamship Co. v. Tugman*, 106 U.S. 118, 121 (1882); RESTATEMENT (SECOND) OF THE FOREIGN

[8] The term "national" is a modern term that encompasses the meanings of both "citizen" and "subject." *See* J. MERVYN JONES, BRITISH NATIONALITY LAW AND PRACTICE 3-5 (1947). "Nationality" has been defined as "the legal tie which binds individuals to the State and entitles them to its protection in international relations, and also renders them subject to the personal jurisdiction of the State." *Id.* at 2. Because the terms "citizen" and "subject" are somewhat awkward when applied to corporations, the term "national" is sometimes used instead.

RELATIONS LAW OF THE UNITED STATES § 26 (1965)); *see Koehler*, 209 F.3d at 139. The dissenters in *Koehler* and in *Matimak* also focused on the extent to which the company in question was under the power of, or otherwise connected with, a foreign state. For instance, in her dissent from the denial of rehearing *en banc* in *Koehler*, Judge Sotomayor opined that "the drafters of the Constitution chose the words 'citizens' or 'subjects' to refer to the broad category of those under the authority of a foreign power." 229 F.3d at 191 (Sotomayor, J., dissenting from the denial of rehearing *en banc*); *see also id.* at 193 ("Dependent upon the law of the United Kingdom, Bermuda corporations exist under the sovereignty of the United Kingdom. They are, for purposes of 28 U.S.C. § 1332(a)(2), "subjects" of the United Kingdom."). Similarly, in the dissenting opinion in *Matimak*, Judge Altimari considered it significant that, "[f]or the past 155 years, Hong Kong was *inexorably linked* to Great Britain." 118 F.3d at 91 (Altimari, J., dissenting) (emphasis added). Thus, both sides of the debate regarding the nationality of Overseas Territories corporations appear to agree that the answer lies in the degree to which an Overseas Territories corporation – in this case, a BVI corporation – is subject to the sovereignty of the United Kingdom.

Contrary to *Matimak's* suggestion regarding the laws of Hong Kong (118 F.3d at 86), the relationship between the laws of the Overseas Territories and those of the United Kingdom is not merely that the former may in certain instances be "modelled on" the latter. Rather, the laws of the British Virgin Islands and other Overseas Territories owe their very existence to an Act of Parliament, which is the source of all local governmental authority. The West Indies Act 1962 authorized Her Majesty the Queen to establish a new government for the British Virgin Islands and other Caribbean territories:

> Her Majesty may by Order in Council make such provision as appears to Her expedient for the government of any of the colonies to which this section applies, and for that purpose may provide for the establishment for the colony of such authorities as She thinks expedient and may empower such of them as may be specified in the Order to make laws either generally for the peace, order and good government of the colony or for such limited purposes as may be so specified subject, however, to the reservation to Herself of power to make laws for the colony for such (if any) purposes as may be so specified.[9]

Pursuant to this Act of Parliament, the BVI constitution was granted by Order in Council in 1976. Under the constitution, the executive authority is vested in the Queen. Virgin Islands (Constitution) Order 1976, S.I. 1976 No. 2145 *see* § 13 [hereinafter "BVI CONST."]. The Queen is represented in the British Virgin Islands by a Governor, who is appointed to hold office "during Her Majesty's pleasure." *Id.* at § 3(1). All BVI local laws are subject to the approval of Her Majesty or Her representative in Her name. *Id.* at § 42. As contemplated by the West Indies Act, the BVI constitution reserves to Her Majesty the "full power to make laws for the peace,

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[9] West Indies Act 1962, c. 19 § 5(1). Section 5 of the West Indies Act applies to the colonies that, at the time of enactment, were included in the British Caribbean Federation, and to the Virgin Islands, which was not part of the Federation. *Id.* at § 5(6).

order and good government of the Virgin Islands." *Id.* at § 71.[10]

According to the BVI constitution, the legislature of the British Virgin Islands consists of "Her Majesty and a Legislative Council." BVI CONST. at § 25. The Legislative Council is composed mostly of elected members, and has the power "to make laws for the peace, order and good government of the Virgin Islands." *Id.* § 34. Subject to certain procedural requirements, however, the United Kingdom, acting through its representative the Governor of the BVI, has the legal authority to pronounce that a bill that has failed to pass in the Legislative Council will nonetheless take effect, either in the form in which it was introduced, or with amendments proposed in the Legislative Council or in a committee thereof. *Id.* at § 44. Conversely, laws passed by the Legislative Council – each member of which must swear allegiance to the Crown – may be "disallowed by

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[10] This power has been exercised on recent occasions. *See, e.g.*, The Caribbean Territories (Criminal Law) Order 2000 (decriminalizing homosexual acts between consenting adults in private); The Caribbean Territories (Abolition of Death Penalty for Murder) Order 1991, S.I. 1991 No. 988 (enacted pursuant to §§ 5 and 7(3) of the West Indies Act 1962).

Section 7(3) of the West Indies Act 1962 sets forth the procedure applicable to Orders in Council made pursuant to the Act. If a statutory instrument contains an Order in Council that adapts or modifies an Act, it "shall be subject to annulment in pursuance of a resolution of either House of Parliament." A statutory instrument containing an Order in Council that does not adapt or modify any Act "shall be laid before Parliament after being made."

the Crown, by virtue of its prerogative, at any subsequent time." 6 HALSBURY'S LAWS OF ENGLAND ¶ 1037, at 514 (4th ed. 1991) [hereinafter HALSBURY'S LAWS]; BVI CONST. §§ 36, 43. The Governor, after consulting with the Chief Minister,[11] may dissolve the Legislative Council at any time. BVI CONST. at § 47(2). Finally, laws passed by the Legislative Council that are either repugnant to the BVI constitution, or to any Act of Parliament that applies to the British Virgin Islands, are void. The Colonial Laws Validity Act 1865 demonstrates clearly the overarching sovereignty of the United Kingdom.[12] For this reason, it is generally accepted that the legislatures of Overseas Territories do not have the power to amend their constitutions. *See generally* ELIZABETH W. DAVIES, THE LEGAL STATUS OF BRITISH DEPENDENT TERRITORIES 160-64 (1995).

It is clear from the foregoing that Her Majesty's Government remains sovereign over the British Virgin Islands notwithstanding its grant of certain governmental powers to local authorities. All BVI laws – including the

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[11] The Chief Minister is appointed by the Governor from the elected members of the Legislative Council in accordance with § 15(1) of the Constitution.

[12] The Colonial Laws Validity Act 1865 provides that "[a]ny colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative." Colonial Laws Validity Act 1865, c. 63 § 2; *see also* BVI CONST. § 42(2)(c).

BVI Companies Act (CAP. 285) and the BVI International Business Companies Act (CAP. 291), under which BVI companies are incorporated – while enacted by the Legislative Council, are the products of an Act of Parliament, and have received Her Majesty's assent. These laws are not merely "ultimately traceable" to the Crown, they were passed under the authority of the Crown.

In concluding that Bermuda corporations and citizens were U.K. citizens or subjects, the dissent from the denial of rehearing in *Koehler* found the similar constitutional structure of Bermuda significant. Judge Sotomayor stressed that "'Bermuda and its government exist under the sovereignty of the Crown'" in that "[a]ll authority to make laws for the 'peace, order, welfare and good government of Bermuda' is granted to the Bermuda legislature solely by the United Kingdom, which regulates Bermuda lawmaking." 229 F.2d at 192 (Sotomayor, J., dissenting from denial of rehearing *en banc*) (quoting 6 HALSBURY'S LAWS ¶ 883). Similarly, the BVI government and BVI corporations (which are created under BVI laws) are properly viewed as subject to the sovereignty of the United Kingdom, and citizens or subjects of the United Kingdom within the meaning of 28 U.S.C. § 1332. There is no significant distinction between the BVI's constitutional relationship with the United Kingdom and the relationship between the United Kingdom and its other Overseas Territories.

C. The Sovereignty of the United Kingdom Over Overseas Territories Corporations Is Manifested by the Fact That the United Kingdom Is Internationally Responsible For Those Territories and Their Inhabitants.

In granting powers to the local BVI government, Her Majesty's Government retained full authority over crucial areas of policy in the territories, most importantly international relations and defense, including the armed forces. *See* BVI CONST. § 19 (bestowing responsibility for these and other areas on the Governor); *see also* DAVIES, *supra*, at 80, 81, 207 (1995); 6 HALSBURY'S LAWS, *supra*, ¶¶ 983, 1080; SIR KENNETH ROBERTS-WRAY, COMMONWEALTH AND COLONIAL LAW 266-67 (1966). As a result, Her Majesty's Government in the United Kingdom remains internationally responsible for the Overseas Territories. One consequence of this responsibility is that "the acceptance by the United Kingdom of an international convention will create international obligations and liabilities on the part of the United Kingdom in respect of the [Overseas Territories] unless the territorial application of the convention is expressly or impliedly limited to the United Kingdom or to a portion of those dependencies." 6 HALSBURY'S LAWS, *supra*, ¶ 983 at 472. To satisfy these international obligations, the United Kingdom can and often does pass legislation directly affecting the rights and duties of individuals and corporations resident within the Overseas Territories.

The United Nations Act 1946, for instance, empowers Her Majesty by Order in Council to make such provision as appears necessary or expedient for enabling measures that the Security Council of the United Nations call upon Her to make. With certain exceptions not relevant here, any such order may extend "to any part of [Her]

Majesty's dominions." United Nations Act 1946, c. 45 § 2. The Queen in Council has exercised this power frequently in recent years, for example to implement in the Overseas Territories the obligation to comply with U.N. sanctions. *See, e.g.*, The Libya (U.N. Sanctions) (Dependent Territories) Order 1993, S.I. 1993 No. 2808; The Iraq and Kuwait (U.N. Sanctions) (Dependent Territories) Order 1990, S.I. 1990 No. 1652; s*ee generally* DAVIES, *supra*, at 233 & n.13. Such "sanctions orders" typically impose criminal liability on the owners or charterers of ships or aircraft used to transport restricted goods to the sanctioned country. The sanctions orders are applicable to ships or aircraft registered in the Overseas Territories to which they apply, and to "any other ship or aircraft that is for the time being chartered to any person who is (a) . . . a British Dependent Territories citizen, . . . or (b) a body incorporated or constituted under the law of the [Overseas] Territory." *E.g.*, The Liberia (U.N. Sanctions) (Overseas Territories) Order 2001, S.I. 2001 No. 946 § 6; The Al-Qa'ida and Taliban (U.N. Measures) (Overseas Territories) Order 2002, S.I. 2002 No. 112 § 6.

Other Acts of Parliament provide that Her Majesty in Council may extend the application of the Act to the Overseas Territories and to the extraterritorial actions of "bod[ies] incorporated under the law of . . . any colony."[13] *See, e.g.*, Anti-Terrorism, Crime and Security

[13] "Colony" means (in statutes passed after 1978) "any part of Her Majesty's dominions outside the British Islands except (1) countries having fully responsible status within the Commonwealth, (2) territories for whose external relations a country other than the United Kingdom is responsible, or (3) any associated state." 6 HALSBURY'S LAWS ¶ 805 (footnotes omitted). In modern practice, the terms "Dependent Territory" and now "Overseas Territory" have replaced the term "colony."

Act 2001, c. 24 §§ 44(3), 51(2), 57; Landmines Act 1998, c. 33 §§ 3(4), 29(4); Chemical Weapons Act 1996, c. 6 §§ 3(3), 39(3); Deep Sea Mining (Temporary Provisions) Act 1981, §§ 1(5), 18(6). This power of extension is exercised through subsequent statutory instruments entered by Her Majesty in Council. *See, e.g.*, Landmines Act 1998 (Overseas Territories) Order 2001, S.I. 2001 No. 3499 sch. § 1 3(3) (extending provisions of the Landmines Act to corporations incorporated in the British Virgin Islands and other territories); Deep Sea Mining (Temporary Provisions) Act 1981 (Guernsey) Order 1997, S.I. 1997 No. 2978 (applying Section 1 of the Act to Guernsey corporations).

These instances of direct regulation by the Government of the United Kingdom of the extraterritorial behavior of Overseas Territories corporations and individuals reflect the United Kingdom's sovereignty over such entities and persons. As a general rule, a state may regulate the extraterritorial behavior of only its own nationals. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987) [hereinafter RESTATEMENT] ("[A] state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory . . . ."); *id.* § 213 cmt. b (explaining that corporate nationality is relevant under international law because "[a] state may exercise jurisdiction to prescribe laws for acts of its corporate nationals committed outside of its territory"); JONES, *supra*, at 1-2 (noting that "personal jurisdiction" over persons,

including the right to protect them and to legislate with respect to their conduct abroad, is based upon nationality).

In addition to regulating the extraterritorial acts of Overseas Territories corporations, the United Kingdom has included such corporations among those persons whose interests are protected against the acts of foreign states. *See* JONES, *supra*, at 288 ("It is the practice of His Majesty's Government in the United Kingdom to protect, as against foreign Powers, . . . [c]orporations owing their existence to the law in force in the United Kingdom and colonies."). For example, the Protection of Trading Interests Act 1980, c. 11 § 6, provides corporations incorporated "in a territory outside the United Kingdom for whose international relations Her Majesty's Government in the United Kingdom are responsible" with a cause of action to recover in certain circumstances that portion of a damage award, entered against such corporation by courts in other countries, that exceeds single compensatory damages. Moreover, the United Kingdom's Rules Applying to International Claims expressly define the term "United Kingdom national" to include "[c]ompanies incorporated under the law of the United Kingdom or any territory for which the United Kingdom is internationally responsible." L-31 (Rule 1(b), Rules Applying to International Claims, 7 Diplomatic Service Procedure Manual, Annex 1 (Mar. 1996)). The fact that the United Kingdom considers itself responsible for the protection of Overseas Territories corporations in the international realm is another indication that such corporations are subject to the sovereignty of, and thus citizens or subjects of, the United Kingdom. *See* BROWNLIE, *supra*, at 406 (explaining that, with a few exceptions, "states may only exercise diplomatic protection in respect of their nationals"); RESTATEMENT, *supra*, § 213 cmt. b (noting that a state may make a claim for injury done to its corporate nationals by another state);

JONES, *supra*, at 2 (noting that a state's right to protect persons outside its territory is based upon nationality).

D. The United Kingdom's Sovereignty Over Its Overseas Territories Is Internationally Recognized, as Evidenced in Many Bilateral Treaties, Including Those With the United States.

The international community recognizes the United Kingdom's authority to enter into agreements on behalf of its Overseas Territories. Such agreements reflect the United Kingdom's responsibility for its Overseas Territories, and the inhabitants and corporations thereof, as well as the widespread international acknowledgment of this close relationship. Bilateral treaties entered into by the United Kingdom on behalf of its Overseas Territories directly affect the rights and obligations of Overseas Territories corporations in a wide variety of ways by, for example, protecting investments in foreign countries made by Overseas Territories corporations,[14] and by settling such corporations' claims against foreign governments.[15] Many of these bilateral agreements

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[14] *See, e.g.*, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Sri Lanka for the Promotion and Protection of Investments, Feb. 13, 1980, 19 I.L.M. 886 (1980) (extended to Hong Kong by virtue of an Exchange of Notes with effect as of Jan. 14, 1981) (providing that the investments of nationals of one contracting Party "shall enjoy full protection and security in the territory of the other Contracting Party").

[15] *See, e.g.*, Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Socialist Republic of Romania Relating to

expressly define the term "United Kingdom nationals" to include Overseas Territories corporations,[16] which are entitled to enforce their rights under the agreements in the appropriate forum. *See Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, 30 I.L.M. 577 (ICSID June 21, 1990) (resolving claim of Hong Kong corporation in arbitration pursuant to United Kingdom's accession to the International Convention for the Settlement of Investment Disputes).

The United States itself has expressly recognized the United Kingdom's sovereignty over its Overseas Territories and the inhabitants and corporations thereof. The Consular Convention between the United States and the United Kingdom applies to "all [Her] Majesty's colonies and protectorates" and defines United Kingdom "nationals" to include "all juridical entities duly created under the law of any of those territories." Consular Convention, June 6, 1951, U.S.-U.K., arts. 1(2) and 2(4), 3 U.S.T. 3426. In addition, bilateral treaties between the United States and the United Kingdom reflect the understanding of the United States that the United Kingdom is sovereign over its Overseas Territories in the area of international affairs, and must act on their behalf

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the Settlement of Certain Financial Matters, London, Jan. 12, 1976, U.K.T.S. No. 9 (1976) (Cmnd. 6376) (settling claims of United Kingdom nationals against Romania regarding expropriated property and outstanding debt).

[16] *See, e.g., id.* at art. 2, §§ (1)(a)(ii), (1)(b)(ii) (defining the term "United Kingdom nationals" to include "corporations . . . constituted under the laws in force in . . . any territory for the international relations of which the United Kingdom Government are . . . responsible").

in dealing with other nations.[17] These treaties made between the United States and the United Kingdom may directly affect the rights and obligations of corporations and inhabitants of the Overseas Territories, as well as their governments. For example, in an agreement with the United Kingdom regarding Reciprocal Fisheries, the

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[17] Examples of the many bilateral treaties between the U.S. and U.K. regarding U.K. Overseas Territories include: Agreement Concerning Maritime and Aerial Operations to Suppress Illicit Trafficking by Sea in Waters of the Caribbean and Bermuda, July 13, 1998, U.S.-U.K. U.K.T.S. No. 2 (2001) (Cm. 5031) (not yet in force); Treaty Concerning the Cayman Islands and Mutual Legal Assistance in Criminal Matters, July 3, 1986, U.S.-U.K., 26 I.L.M. 536 (1987) (extended to the British Virgin Islands and other territories by exchange of notes dated Nov. 9, 1990, T.I.A.S. 11765); Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland (on Behalf of the Government of Bermuda) Relating to the Taxation of Insurance Enterprises and Mutual Assistance in Tax Matters, July 11, 1986, T.I.A.S. 11676; Extradition Treaty, June 8, 1972, U.S.-U.K., 28 U.S.T. 227 (extended to the British Virgin Islands and other territories "for the international relations of which the United Kingdom is responsible" by exchange of notes dated Oct. 21, 1976); Agreement Concerning Alien Amateur Radio Operators, Nov. 26, 1965, U.S.-U.K., 16 U.S.T. 204 (extended to territories "for the international relations of which the Government of the United Kingdom of Great Britain and Northern Ireland is responsible" by exchange of notes dated Dec. 11, 1969, 20 U.S.T. 4089); Agreement for Technical Co-Operation in Respect of the Territories for the International Relations of which the Government of the United Kingdom are Responsible, July 13, 1951, U.S.-U.K., 2 U.S.T. 1307.

United States granted BVI commercial fishing vessels the right to operate within the exclusive fishery zone of the United States. Reciprocal Fisheries Agreement, June 24, 1977, U.S.-U.K., art. II, 29 U.S.T. 5653 (terminated by its terms Dec. 31, 1978). A very recent such Agreement deals with the exchange of tax information between the United States and the Cayman Islands with respect to, *inter alia*, Cayman Islands and United States companies, partnerships, and other persons.[18]

It is doubtful that the United Kingdom would make such arrangements with the United States and other nations on behalf of entities that it did not consider its citizens or subjects. *See* JONES, *supra*, at 2 ("As a state is usually only concerned with the interests of its own nationals, it commonly stipulates, in treaties, for benefits restricted to such nationals."). The agreements discussed above show that the United States and other nations also recognize the sovereignty of the United Kingdom over corporations and citizens of the Overseas Territories. This recognition, like the stated position of the United Kingdom, is entitled to deference from the courts.

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[18] Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Including the Government of the Cayman Islands, for the Exchange of Information Relating to Taxes, November 27, 2001 (not yet in force).

II. NATURAL PERSONS WHO ARE CITIZENS OF THE OVERSEAS TERRITORIES ARE ALSO NATIONALS OF THE UNITED KINGDOM

The *Matimak* court's reliance on the British Nationality Act 1981, in holding that an Overseas Territories corporation is not a citizen or subject of the United Kingdom, was misplaced. As explained above, the 1981 Act – which deals only with natural persons, and not corporations – obviously has no bearing on the precise question before this Court. But, even with respect to natural persons, *Matimak* was incorrect in suggesting that the Act demonstrates that "Dependent Territories citizens" under the Act are not citizens or subjects of the United Kingdom for alienage diversity jurisdiction purposes. As an initial matter, the court of appeals was simply wrong in stating that the Act "clearly distinguishes between citizens of the United Kingdom and citizens of 'British Dependent Territories.'" 118 F.3d at 86. In fact, the Act classifies natural persons into several groups, one of which is "British Dependent Territories citizen," and another of which is "British citizen" – but the term "citizen of the United Kingdom" is not used. Moreover, it is widely recognized that the phrase "British Dependent Territories citizen" is used to classify a particular kind of United Kingdom national – one whose nationality stems from a connection with one of the Overseas Territories rather than with the metropolitan United Kingdom itself. *See* 4(2) HALSBURY'S LAWS ¶ 31.

Although, as the *Matimak* court noted, British Dependent Territories citizens do not currently enjoy rights identical to those of "British citizens" under that Act, "[t]he distinctions of municipal law between various types of nationality do not affect the general conception of nationality as accepted in international law and usage." JONES, *supra*, at 289; *see* BROWNLIE, at 400 ("[I]n the

case of the United Kingdom, the position is that the inhabitants of dependencies, whatever their internal status under the British Nationality Act 1981, are considered to have the status of national for purposes of international law.") In any event, a Bill currently before Parliament will soon minimize the distinction by granting "British citizenship" to most British Dependent Territories citizens, in addition to their existing citizenship. *See* British Overseas Territories Bill [HL], *as introduced on* June 21, 2001, §§ 2(1), 3 (*available at www.parliament.the-stationery-office.co.uk/pa/pabills.htm*).

Even in the absence of such legislation, however, it is clear that British Dependent Territories citizens are properly considered United Kingdom nationals, and thus "citizens or subjects of a foreign state" under the alienage diversity jurisdiction statute. Numerous U.K. statutes define "nationals of the United Kingdom" to include Dependent Territories citizens, and reflect the United Kingdom Government's understanding that such persons are not "stateless." *See, e.g.*, Anti-Terrorism, Crime & Security Act 2001, c. 24 §§ 44, 81(3) (defining "United Kingdom National" as including "a British Dependent Territories citizen"); Landmines Act 1998, c. 33 § 3(5) (same); British Nationality (Hong Kong) Act 1997, c. 20 § 1(2) (allowing certain categories of natural persons to register as British citizens, including a person who "was a British Dependent Territories citizen by virtue only of his having a connection with Hong Kong," and who "*would have been a stateless person if he had not been such a citizen*") (emphasis added). The 1981 Act does not, as the *Matimak* court suggested, render natural persons from the Overseas Territories – much less Overseas Territories corporations – stateless.

Finally, this Court has held that the United States Constitution incorporated the principle that citizenship is conferred by virtue of birth within the territory of a State, which stems from the common law rule that "all persons born under British dominion" are British subjects. *Wong Kim Ark*, 169 U.S. at 657, 693; *see also Inglis v. Trustees of the Sailors' Snug Harbor*, 28 U.S. 99, 120 (1930) ("It is universally admitted, both in the English courts and in those of our own country, that all persons born within the colonies of North America, while subject to the crown of Great Britain, were natural-born British subjects . . . ."); *Wong Kim Ark*, 169 U.S. at 657 ("By the common law of England, every person born within the dominions of the crown . . . was an English subject, save only the children of foreign ambassadors, . . . or a child born to a foreigner during the hostile occupation of any part of the territories of England.") (quoting SIR ALEXANDER JAMES EDMUND COCKBURN, NATIONALITY 7 (1869)). Although the *Wong Kim Ark* Court was addressing the meaning of "citizens of the United States" under the Fourteenth Amendment to the U.S. Constitution, the principle is equally applicable to the reference to "foreign . . . Citizens or Subjects" in Article III. Thus, it is entirely consistent with the Framers' intent that a person born in an Overseas Territory of the United Kingdom is a "citizen" or "subject" of the United Kingdom – a foreign state – and is entitled to invoke and be subject to the alienage diversity jurisdiction of the United States federal courts.

CONCLUSION

In Diplomatic Notes and multiple *amicus curiae* briefs, the Government of the United Kingdom has consistently taken the position that companies incorporated under the laws of its Overseas Territories are citizens or subjects of the United Kingdom. The United

Kingdom has thus urged the courts of the United States to provide a neutral federal forum for the resolution of disputes between these companies and U.S. nationals. Under principles of international comity, the position of the U.K. Government on the nationality of its Overseas Territories corporations should be accorded substantial weight by this Court. Moreover, the wealth of evidence indicating that Overseas Territories corporations are subject to the sovereignty of the United Kingdom strongly supports the conclusion that such corporations are citizens or subjects of the United Kingdom within the meaning of the alienage diversity jurisdiction statute. The judgment of the court of appeals dismissing the suit for lack of subject matter jurisdiction therefore should be reversed, and the case should be remanded for further proceedings on the merits.

Respectfully submitted,

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